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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Telecommunications Services) CS Docket No. 95-184
Inside Wiring)
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Customer Premises Equipment)
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In the Matter of)
)
Implementation of the Cable) MM Docket No. 92-260
Television Consumer Protection)
and Competition Act of 1992)
)
Cable Home Wiring)

SURREPLY COMMENTS OF COX COMMUNICATIONS, INC.
ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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SURREPLY COMMENTS OF COX COMMUNICATIONS, INC.
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Cox Communications, Inc. ("Cox"), by its attorney, hereby submits its surreply comments in the above-referenced proceedings.

In the limited time afforded to prepare this reply,¹ Cox has not retained an economist to review and rebut the "Report on the Competitive Effects of Exclusive Contracting for Video Programming Services in Multiple Dwelling Units" prepared by Professor Michael D. Whinston for the Independent Cable and Telecommunications Association ("ICTA"). Cox believes, however, that it does not take an economist to see that several of the key assumptions underlying Professor Whinston's analysis are wrong.

First, Professor Whinston's report states that exclusive contracts between MDU

¹ By Order dated January 16, 1998, the Commission established a reply comment date of March 2, 1998 and a surreply comment date of March 16, 1998, two weeks later.

owners and multichannel video programming distributors (“MVPDs”) are anticompetitive if “the third parties who are impacted by the contract [are not] present in the bargaining and negotiations over the contract in question.”² The report then asserts that exclusive arrangements between private cable companies and MDU owners are pro-competitive because the owners must represent the interests of their tenants or be doomed to failure in the real estate business.³

The proposition that a tenant’s choice of apartment or condominium would be controlled solely (or even principally) by which MVPD serves the building is dubious at best. Moreover, even assuming that choosing the “wrong” service provider “places [building owners’] ability to rent their units in jeopardy,”⁴ it is highly unlikely that all tenants in the MDU would share a common perspective on which video programming service should be selected. As every MVPD knows, customers have a wide variety of reactions to cable (and similar) offerings: some are interested primarily in receiving clear over-the-air broadcast signals, some want hundreds of program service options and still others care mostly about pay-per-view. Unless the multichannel video services being considered by the building owner are identical in every respect save price – a highly improbable scenario – it cannot fairly be said that the building owner represents the views of all tenants when entering into an exclusive service contract with an MVPD.⁵ A far

² “Report on the Competitive Effects of Exclusive Contracting for Video Programming Services in Multiple Dwelling Units” by Michael D. Whinston, attached to Reply Comments of Independent Cable and Telecommunications Association, at 4.

³ Id. at 6.

⁴ Id.

⁵ The report also fails to take into account an MDU owner’s self-interest in selecting an MVPD. Commenters in this proceeding repeatedly have pointed out that the interests of a building owner when choosing an MVPD do not necessarily coincide with those of its tenants. This reality should not be

more effective means of ensuring that tenants get the programming options they want is to let them select directly from among competing service providers pursuant to non-exclusive arrangements, as Cox and others have proposed.

Second, Professor Whinston's report asserts certain "efficiencies" that allegedly can be derived from exclusive service contracts. Yet it does so at the expense of consumer choice. It arguably may be more "efficient," in some economic sense, for a city to issue an exclusive cable franchise or for a single telephone company to have a lock on the provision of local exchange service. Congress and the FCC have already decided, however, that encouraging competition and giving customers a choice of service providers is the better policy result.

Even if some proven "efficiency" were the only regulatory goal, moreover, the report makes some odd assertions. The report concedes, for example, that the more efficient video service provider may well be the cable operator⁶ – but it then goes on to say that exclusivity should be allowed in order to ensure that the less efficient provider (i.e., the private cable operator) is the one that offers service. The report also claims that having two service providers in the same MDU is "inefficient" because they will be fighting over the same revenue stream. But the truth is that MVPDs such as Cox increasingly are offering multiple products (such as high-speed Internet access and digital television) over the same wire. There is thus every reason to believe that entry by new providers will cause the "pie" to grow in a rich variety of services, just as it has in the

discounted when assessing the effect that exclusive arrangements have on MDU residents' ability to receive the services of their choice.

⁶ Id. at 12-13 (["[the local franchised operator's] costs may be lower because it need not install any reception equipment – its signal is already just outside the MDU").

long distance and other markets where competition for the subscriber has been introduced.

Finally, the report assumes that the relevant market is broader than an individual building and that the “buyers” are building owners, not individual tenants. As Cox and others have repeatedly pointed out, however, the Commission’s stated focus throughout this proceeding has been on adopting policies that foster the ability of subscribers who live in MDUs to choose among competing video service providers. Although an exclusive service arrangement in one building may not affect the options available to other MDUs in the area, it does eliminate choice for the very persons whose interests the Commission is trying to protect: the first building’s residents.

Cox and other commenters have previously noted that the Commission’s task in this rulemaking is not to shield certain MVPDs from competitive forces. This is particularly true where, as here, the parties and the Commission agree that competition to provide multichannel video programming to MDUs is already substantial⁷ – and, indeed, is getting fiercer every day.⁸ The Commission therefore should stay its course of promoting individual subscriber choice and discount the faulty economic analysis

⁷ Id. at 8-9 (cites omitted). Similarly, the Commission should reject WCA’s request that the Commission not regulate exclusive contracts for non-video services such as high-speed Internet access. Reply Comments of the Wireless Cable Association International, Inc. at 16-17. The provision of Internet access service currently is highly competitive, and there is no sound policy reason to preclude consumers who happen to live in MDUs from enjoying the full benefit of that competition.

⁸ See “DSS Finally Rings Up Baby Bells,” Multichannel News, Vol. 19 No. 10 (March 9, 1998) at 1 (reporting that SBC Communications Inc. and Bell Atlantic Corp. have signed agreements to distribute DBS programming, with the former BOC planning “to focus on apartments and other multiple-dwelling-unit markets”).

embracing exclusivity for private cable operators submitted by ICTA.

Respectfully submitted,

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